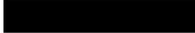


STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Good Morning Sales Inc.

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid vacation pay
RSA 275:43 V unpaid sick pay
RSA 275:44 IV liquidated damages

Employer: Good Morning Sales Inc, 272 Londonderry Trnpke, Hooksett, NH
03106

Date of Hearing: March 17, 2015

Case No.: 49739

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant originally asserted, through the filing of his wage claim, that he was due a 75% payout of his accrued vacation and sick time, pursuant to the written policy of the employer, or \$8,600.00; or alternately, he was due sick and/or vacation pay from December 4, 2014 through the date of the hearing and asked for the Department to order the employer to continue to pay sick and/or vacation pay.

The claimant sustained a work related injury on December 4, 2014. The carrier denied his claim. He then sought payment of sick and/or vacation pay through the employer under the employer's written policy which reads, "If the [worker's compensation] claim is denied all available sick/vacation time will be used until the employee returns to work or sick/vacation time is exhausted."

The employer denied the use of the sick and/or vacation time after the claim had been denied because the claim had not been denied entirely, only that more information had been required of the claimant.

The claimant sought Workers Compensation benefits for his work related injury through a separate hearing with this Department. The Department awarded benefits beginning December 4, 2014.

The claimant requested, in the appropriate timeframe, to hold the employer liable for liquidated damages.

At the hearing, the claimant clarified he alleged that the 75% payout of his accrued sick and vacation time was due to him. He sought \$6,293.63 for the 75% payout of 645.5 hours of vacation pay at an hourly rate of \$13.00; and \$5,211.38 for the 75% payout of 534.5 hours of sick pay at an hourly rate of \$13.00.

The employer denied the claimant was due any sick and vacation payments or payout. He alleged the Workers Compensation payments and having sick and vacation payments would be considered "double dipping." Further, the cash out program for vacation and sick pay are at management discretion, not required payouts. The claimant also did not have the correct accruals for the sick and vacation pay.

The employer submitted corrected sick and vacation pay accruals at the hearing, Defendant's Exhibit #1. However, by the conclusion of all testimony, both parties agreed the accruals submitted were not correct.

The hearing was left open until March 31, 2015, for the employer to submit corrected accruals and a closing statement. The Department received the documentation within the required timeframe. The claimant was given until April 17, 2015, to submit a response and closing statement. The Department received the documentation within the required timeframe.

FINDINGS OF FACT

The claimant worked for the employer from December 1996 through January 8, 2015, when the employer terminated his employer via letter. His rate of pay relevant to this claim was \$13.00.

The claimant argued that the employer owes a payout of 75% of his accrued sick and vacation pay pursuant to the employer's written policy. Because he received the Workers Compensation benefits, he no longer sought his alternate claim.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding vacation and sick leave pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275: 49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer properly notified the claimant of the written policies regarding the sick and vacation programs.

The employer's policy regarding benefits reads as follows, "Full Time Employees (30 hours or more/week) are eligible for all benefits after a 90 waiting period unless otherwise noted."

The vacation and sick time have separate written payout policies.

The employer's written policy relative to vacation time payout reads in relevant part, "All unused vacation time may be cashed in at 75% rate of vacation pay at management discretion."

This established a practice and policy to allow the employer discretion as to whether or not they wanted to pay vacation pay. This is allowable under New Hampshire law because the employer, in their discretion, chose not to pay the claimant 75% of his accumulated vacation pay, the Hearing Officer finds that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed vacation pay.

The employer's written policy relative to sick time payout reads in relevant part, "All employees with over one year of service will be credited with seven sick days at the beginning of each calendar year. Should an employee leave during the calendar year, the sick time shall be prorated. All unused sick time will be reimbursed to employee at 75% rate of pay at the end of the calendar year."

The parties agreed the employer had sustained a practice of rolling the sick time over from year to year. The employer had made cash payouts to other employees at different times over the years. The sick policy does not have any management discretion in the payment of the sick pay.

The parties disagreed, even after additional submissions to the Department, on the sick time the claimant had accrued. The employer offered that the claimant has accrued 323.63 hours of sick time. The claimant countered that he had 393.50 hours accrued, assuming he worked over a thirty hour week each week in 2013 and 2014. He alternatively offered an accrual of 348.5 hours of sick pay based on the knowledge he did not work the required 30 hours or more each week to receive full time benefits.

The employer did not submit documentation to the Department to show how he arrived at his accrual of 323.63, instead offering that it was available upon request. The claimant provided many pay stubs to provide documentation for his accounting.

The Hearing Officer finds it more probable than not that the claimant's prorated figures, based on the weeks he worked the required hours to earn benefit time pursuant to the written policy, are the closest accounting of the actual sick time accrued.

The Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed sick time payout under the written policy of the employer, or \$3,397.88 (348.5 hours sick pay * (\$13.00 * 75%)).

The claimant argued the employer should be liable for liquidated damages.

RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer, "willfully and without good cause fails to pay" all wages within the timeframe required by statute. The New Hampshire Supreme Court defined "willfully and without good cause" in Ives v. Manchester Subaru, Inc. 126 NH 796 to mean, "voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed". The Court continued, "an employer acts willfully if, having the financial ability to pay wages which he knows he owes, he/she fails to pay them".

Despite claimant's counsel's disparaging remarks regarding the employer's refusal to pay the requested benefit time, the Hearing Officer finds the employer's argument that he did not believe the claimant was due the payments, persuasive. The employer steadfastly denied owing the vacation and sick payments to the claimant prior to the filing of this claim through to the current date.

Therefore, the Hearing Officer finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay him all wages due in the time required because the employer had a genuine belief that the vacation and sick payments/wages were not owed.

The claimant also sought attorney's fees for this action.

Claimant's counsel argued that attorney's fees or costs can be awarded through this jurisdiction pursuant to Galloway v. Chicago-Soft, 142 N.H. 752, 759 (1998). The court opined, "[W]e recognize that the size of many wage claims is so small that the practical value of a plaintiff's verdict is often decidedly modest after counsel's fee has been deducted from the recovery. Accordingly, we hold that when the court has found a wage claim meritorious, it should exercise its statutory discretion by awarding reasonable counsel fees, unless the court further finds particular facts that would render such an award inequitable."

RSA 275:51 V does not authorize this Department to award attorney's fees or costs. This is distinct from RSA 275:53 III that allows "costs of the action, and reasonable attorney's fees", but by a "court of competent jurisdiction". The New Hampshire Department of Labor is an administrative agency and a part of the executive branch of government. The Department is not a "court of competent jurisdiction". Therefore, no fees or costs can be awarded through this decision.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, as RSA 275:43 V considers vacation pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is due any vacation pay, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43 V considers sick pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant proved by a preponderance of the evidence that he is due the claimed sick pay, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$3,397.88.

As RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer willfully and without good cause fails to pay wages due in the time frame required by statute, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay wages due in the time frame required, it is hereby ruled that the portion of the Wage Claim for liquidated damages is invalid.

The employer is hereby ordered to send a check to this Department, payable to William Roy, in the total of \$3,397.88, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: April 29, 2015

MJD/kdc